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No. 1042

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

RICHARD LEE BUONOMO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Richard Lee Buonomo, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit hereinafter set forth.

JUDGMENT AND OPINION OF THE COURT BELOW

The opinion of the Court of Appeals here sought to be reviewed, was rendered on December 16, 1966. It has not yet been printed in the official reports. It is reprinted as Appendix A to this petition.

No opinion was rendered in the district court.

JURISDICTIONAL STATEMENT

Petitioner was indicted in the United States District Court for violation of federal statutes relative to interstate transportation of stolen vehicles. He was sentenced on a plea of guilty, and his sentence was thereafter modified by the District Court.

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit claiming error in the modification of his sentence. The order was affirmed by an opinion of the Court of Appeals on December 16, 1966.

A petition for rehearing was timely filed, and was denied on January 9, 1966.

The jurisdiction of this court is invoked under the provisions of Title 18 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. In passing a federal sentence, does a district judge have any authority with respect to the time and manner of service of a state sentence imposed, but not yet executed against that defendant?

2. Where sentence is imposed on a federal defendant whose custody is not then claimed by any other sovereign or jurisdiction, does that defendant have the right to commence service of his sentence at once?

3. Conversely, does the prosecution have a right to obtain a stay of execution of sentence over the defendant's objection? If so, what is the nature and source of that right?

4. Is there an inherent right in a federal district court, to stay the execution of a sentence over the defendant's objection? Or, on the other hand, is such procedure expressly forbidden by Title 18, U.S.C. Sec. 3568?

5. Where a sentence passed on a federal defendant whose custody is not then claimed by any other confining authority, but who will be required to serve a state sentence at some future date on unspecified conditions,

And where the district court, in passing sentence, directs that the federal sentence run "consecutive to the state sentence", denies a stay of execution, and directs immediate federal incarceration of the defendant, then,

a. Does that sentence mean that the defendant must first serve the state sentence and then commence service of the federal sentence? If so, what is the status of that defendant after sentencing and prior to the commencement of the state sentence?

b. Or, does that sentence mean only that the defendant will receive no federal credit for any time that he may serve on the state sentence?

6. Where a federal defendant is neither in state custody nor subject to immediate state confinement at the time of imposition of a federal sentence, then,

May the federal court, after imposing sentence, direct that a pending but unexecuted and deferred state sentence, be commenced and served prior to the commencement of the service of the federal sentence then imposed?

7. With facts as stated in question 6 above, if the defendant is denied a stay of execution and taken from the bar of the court to the county jail in the custody of the marshal after sentencing, does it not thereby become certain that the court intends that the federal sentence shall commence immediately, and that the state authorities are free to do whatever they wish with reference to the terms and conditions of the service of the state sentence?

8. Where, following imposition of a federal sentence, the defendant is taken into custody and denied bail;

And where no other jurisdiction or sovereign has ordered or requested the confinement of the defendant at that time; then,

a. Has that defendant necessarily commenced service of his federal sentence?

b. If the service of his sentence has not commenced, what is his status and by what right does the marshal hold him?

c. Can his status be changed, against his will, by an order entered on a subsequent day?

9. In a federal criminal prosecution, can the government obtain any lawful benefit from an ex parte motion without notice, where notice to the defense was both necessary and practical?

10. In terms of the status of a sentenced federal prisoner, is there any distinction between "confinement" and "detention"? If so, what is the basis of that distinction?

11. May a District Court direct that regardless of the wishes of the defendant or of the state authorities, a state sentence, not yet commenced, be subsequently commenced and served prior to the commencement of a federal sentence then imposed?

12. Where a federal criminal sentence is ordered to be executed immediately, and where the defendant is taken into custody in pursuance of that order, then

a. Is said defendant entitled to credit against his sentence, for any time thereafter spent in custody?

b. Can the service of said sentence be interrupted by an order entered over defendant's objection, releasing him to the custody of a different confining authority?

13. Can a prosecution prevail on review under a theory at variance from that which it successfully adopted in the trial court?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Fifth Amendment to the Constitution of the United States provides, in relevant part, as follows:

> "No person shall . . . be subject for the same offence to be twice put into jeopardy of life or limb . . ."

Title 18 U.S. Code Section 3568 provides, in relevant part as follows:

> "The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence . . .
>
> * * *
>
> "If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.
>
> "No sentence shall prescribe any other method of computing the term."

STATEMENT OF THE CASE.

This petition seeks review of the modification of a sentence subsequent to its imposition and commencement of its service.

Petitioner was free on bail during a stay of mittimus following conviction on a state charge relating to theft of motor vehicles. While thus enlarged, he pleaded guilty in the federal court to criminal charges also relating to stolen vehicles, and was sentenced, and commenced service of the sentence. The following day, on motion of the government and over defense objection, the court modified the sentence by ordering a "stay of execution" pending incarceration on the state sentence. At the same time bond was increased more than twelve-fold so that petitioner remained in federal custody until the State mittimus issued.

This petition is directed to the claim that the modification of his sentence was unlawful.

Petitioner here presents the facts relevant to his contention.

Trial Court Proceedings.

Petitioner Richard Lee Buonomo, with others, was charged in a ten count indictment. Count 1 charged conspiracy relative to the interstate transportation of stolen motor vehicles and forged certificates of title. The remaining nine counts charged the transportation of stolen vehicles between Illinois and Alabama in violation of Title 18, U.S. Code, Section 2312. (A. 1).

After pre-trial conference with the court (A. 1) and a subsequent conference with the government (A. 3, 4), Petitioner pled guilty to counts 1 and 2 of the indictment

(A. 1, 3). (Counts 3 through 8 were subsequently dismissed as to him on motion of the government, A. 7.)

A pre-sentence investigation was ordered, and sentencing was set for March 29, 1966. (A. 4).

Petitioner had meanwhile been sentenced in the state courts to a three-year sentence for offenses relating to motor vehicles, and had been ordered to commence service of his state sentence on April 1, 1966 (A. 5).

Petitioner pled guilty in federal court on February 14, 1966. (A. 1). He continued at large on his original bond of $4,000. (A. 6).

On March 29, 1966 Petitioner appeared for sentencing. The court reviewed a pre-sentence report indicating prior offenses relative to auto larceny. The court also noted that petitioner was required to commence service of his state sentence on or about April 1, 1966. The court sentenced him to a term of five years on each count to be served concurrently, but to be consecutive to the state sentence (A. 5, 6).

Petitioner thereupon moved for a stay of execution for ten days to permit him to consummate the sale of his house and to straighten out certain problems with the Internal Revenue Service (A. 6). The court inquired whether the government had any objection to such a stay. The prosecutor answered that such matters could be attended to by power of attorney; that there had been "sufficient time for this defendant to wind up his affairs, well knowing that there would be, in all probability, no probation granted in this case and that the defendant would be subject to imprisonment in addition to his state sentence. We feel that there is grave danger that he might flee under these

circumstances." (A. 6). Thereupon, petitioner's motion for stay was denied and defendant was taken into federal custody. (A. 7, 9).

That afternoon, without notice to defense counsel, the prosecutor appeared *ex parte* before the trial judge and presented a motion slip seeking to vacate the order denying the stay of execution, to grant the stay, to reset bond at $50,000, and to remand petitioner to the custody of the U.S. Marshal pending incarceration on the State sentence or the making of $50,000 bond (A. 7). At that time, the prosecutor made the following statement to the court:

> "After leaving this morning, your Honor, it occurred to me that your Honor's sentence may well not be implemented if the defendant was remanded on the execution pursuant to the sentence that your Honor imposed and that the proper course, so that your Honor's sentence would be implemented, would be to grant the defendant's stay for one week so that he might be taken into custody on the state of Illinois mittimus and in the meantime the Government would urge your Honor to reset the defendant's bond at $50,000 and have him remanded to the custody of the Marshal pending a turn-over to the Sheriff of Cook County on the state sentence." (A. 7).

The court inquired whether the prosecutor had communicated with defense counsel. The prosecutor admitted that he had not: "I felt that I should immediately bring this to your Honor's attention". The court entered the motion, continued it to the following morning, and directed the prosecutor to have petitioner and his counsel present at that time (A. 7).

The following morning, petitioner and his lawyer were present. The prosecutor orally moved to vacate the order denying the stay "and join in the defendant's motion that

the stay be granted", but additionally to increase bond and remand defendant to the Marshal's custody pending the making of bond or issuance of a state mittimus. (A. 8).

The defense reminded the court that the stay had been denied the previous day only because the government had made "an impassioned" objection thereto; that petitioner had been serving his sentence for twenty-four hours; that he was no longer seeking a stay; and that he wished to continue to serve his sentence (A. 8, 9).

The prosecutor replied that under rule 35 the court could modify the sentence within sixty days. (A. 9).

The court stated that he had been mistaken on the previous day because he had not realized that the state sentence was not to begin until April 1. Defense counsel reminded the court that the court had recited that fact as a part of the defendant's background. The court answered: "I stated that it was to be consecutive to the state sentence. That, as I say, was a mistake on my part and I am so informing you at this time" (A. 10).

Defense counsel objected that rule 35 would not permit a modification of a sentence in a manner adverse to the interests of the defendant. Defense counsel further objected to the Government making a motion without notice to him, and to the entertaining of the motion other than in written form (A. 11).

The defense further objected to the Government's motion and stated that the Government had had what it wanted the day before, and should not be permitted to change its mind merely because doing so would hurt the defendant. (A. 12).

The court ruled that since no "formal paper" on the sentence had been "signed", it was the court's interpretation of rule 35 that the sentence was subject to change; that the court "was mistaken" and that the Government's motion would be allowed "because it was the court's intention, as I announced yesterday, to have his sentence to run consecutive to the state sentence." (A. 12).

Defense counsel further objected that the court's direction as to consecutive sentence meant nothing more than that the federal court would not grant credit against the federal sentence for any time served on the state sentence; that the court had no power to direct that petitioner should serve the state sentence first. He further stated that petitioner could not possibly raise a $50,000 bail and that he desired to stand by what had been done the previous day. (A. 12, 13). The court adhered to its ruling. (A. 13).

The judgment and commitment signed by the trial court is dated March 29, 1966 (A. 2). It recites that petitioner was committed to a period of five years "consecutive to sentence imposed by the Circuit Court of Cook County Criminal Division". It further recites that petitioner's motion for stay of execution is denied. On the reverse side appears a written legend "enter order", followed by the impression of a rubber stamp date of March 29, 1966 (A. 2).

The record also discloses a draft order entered March 30, 1966, reciting, in relevant part, as follows: "On motion of the Government it is ordered that sentence heretofore imposed on March 29, 1966 be and hereby is modified by vacating that part of order denying stay of execution, and hereby ordering motion for stay of execution

granted until April 2, 1966." The order further directs that the bond be increased to $50,000, "and the defendant is remanded to the custody of the United States Marshal pending incarceration on the state of Illinois sentence, or the making of aforesaid bond." (A. 2, 3).

Proceedings on Appeal.

Petitioner appealed to the United States Court of Appeals from the Seventh Circuit, seeking reversal of the order modifying his sentence. In that court, the government defended the modification on the theory that the sentence had contained an ambiguity and that the District Court had acted with inherent power to resolve that ambiguity (G. Br. in Court of Appeals, P. 5).[1] In the government's view, the contested issue was as follows: "Did the court have jurisdiction to stay a sentence the day following the imposition of that sentence while defendant was still in custody of the United States marshal, so as to implement the clearly expressed sentence?" (G. Br. in Court of Appeals, P. 3).

The Court of Appeals held (Appendix A) "that the District Court had exercised its inherent power" in modifying the sentence; that the government had the right, and the court the power to grant a stay of execution over the defendant's objection; and that the defendant's federal confinement following the imposition of sentence, had been "mere detention", which "did not constitute confinement or imprisonment". The reviewing court further held that defendant had been incarcerated only because he was unable to furnish bail; that he was never held for trans-

[1] The briefs of the parties have been included in the record on appeal.

portation to the place where his sentence was to be served; and that he had never been confined in pursuance of the federal sentence.[2]

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[2] Certain statements within the opinion are not supportable from the record. Thus, the opinion recites that the defense position had been that "because defendant was not able to furnish bail to secure his immediate release, he was in effect actually ordered to commence serving his federal sentence immediately". No such argument was ever made. Rather, the defense argued that the petitioner had been expressly ordered to commence service of his sentence at once (Br. P. 12) and that the marshal had taken petitioner to the Cook County jail in execution of the final judgment of the District Court (Br. P. 4). It is very clear that no amount of money or collateral could have obtained petitioner's release during the first day he was in custody. His status was that of any federal prisoner under a final sentence. He had been sentenced on a plea of guilty; a stay had been denied; and he had been taken into custody. No bond had been set; and there was no reason to imagine that any bond ever would be set, or that any occasion would arise calling for the setting of bond.

REASONS RELIED ON FOR ALLOWANCE FOR THE WRIT.

Rule 19 of this court indicates that a petition for certiorari is appropriate in the event of conflict between circuits; to review a decision in conflict with applicable decisions of this court; and to present a claim of substantial departure from the accepted course of judicial proceedings warranting the exercise of this court's supervision.

It is respectfully suggested that the decision here sought to be reviewed, amply meets all of these criteria.

On a plea of guilty, petitioner was sentenced. It was expressly ordered that he be taken into custody immediately. He served one day of his sentence.

On the following day, the District Court changed its mind, and directed that a different sentence imposed by a state court, be served first.

In order to accomplish that objective, the District Court modified the sentence by "granting" to the defendant, a stay of execution. The defendant did not then want such a stay, and in fact then objected to it; but the government wanted it, and accordingly the stay was granted.

The only purpose of the "stay of execution", was to assure that the state court would be prevented from ordering that its sentence run concurrent with the federal sentence. The District Court, apparently considering that it was in a better position to determine the appropriate state sentence than was the state court, acted to assure that the state would not be able to sentence the Petitioner in a manner different from what the District Court wanted it to do.

Thus, in order to deprive a state court of any opportunity to run its sentence concurrent with the federal sentence, the trial court reached down and called back from federal confinement, a prisoner whom it recently incarcerated. It ordered that he be held in limbo until the state should claim him; that he should then serve the state sentence; and that he should thereafter be reclaimed to commence his federal sentence anew.

We pray and believe that your Honors will share our deep-felt sense of basic wrong, engendered by those facts.

The Theory of Affirmance

It is, we suppose, possible to justify everything that happened to the Petitioner, by changing the facts slightly; by assuming that after sentencing, he was merely "detained" because he was unable to furnish an increased bond. But we cannot imagine how a court can do this. It is sheer pretense. It did not happen. To say that it did, is to do violence to truth, and to sweep a grave constitutional violation under a thread-bare rug.

The tell-tale hump under the carpeting, shows all too clearly in this case.

The Court of Appeals approaches this case, as though the defendant had been granted a stay of execution at the time of his sentencing, and had been "detained" only for failure to deposit increased bail. But those are not the facts of the case, as the opinion itself amply demonstrates.

At the time of his sentencing, the defendant was *denied* a stay of execution and ordered to immediate custody. He did not then appeal, and obviously, in view of his plea of guilty, he then had no grounds for an appeal. Accordingly, he was not only denied bail, but he had no slightest prospect of bail.

We think it obvious that in those circumstances, the defendant was confined after his sentence because he had been sentenced, and for no other reason. The marshal took custody of him, in order to compel him to serve that sentence, and for no other reason.

The fact that the trial court changed its mind on the following day, and decided to stay execution of the sentence, may possibly be relevant to a determination of petitioner's status on the day *after* he was sentenced. But it has absolutely nothing to do with his status during the 24 hours following his sentencing. The stay was not retroactive; it was not intended to be retroactive; and there is simply no conceivable way in which it could be made retroactive.

We must urge to your Honors, a proposition so obvious that it has never before been called into question. It is this: When, after sentencing, a defendant is denied bail and taken into custody pursuant to that sentence—and most especially on a plea of guilty or under other circumstances precluding the possibility of appeal—the resulting custody is a part of his punishment. It is not "mere detention", nor is any other euphemism appropriate. He is being punished.

We must urge a second proposition, equally obvious: The sentenced defendant may be punished only once in pursuance of any one sentence. He cannot be made to serve a part of it; then to pause in an uncertain status; and then to serve some more of it; and so forth.

To grant those two propositions, is to concede that the petitioner here is entitled to relief. For it is clear upon the facts recited in the opinion of the Court of Appeals, that the petitioner served at least one day of his sentence.

And while this is referred to, within that opinion, as "mere detention", the facts speak louder than the conclusion. If one day's service of sentence is not sufficient to energize the protective force of the Fifth Amendment, it is hard to see where the breaking line might be. One week? One month? One year? The Fifth Amendment itself contains no such qualifications. Its protection is stated in absolute terms.

Against his will, the petitioner commenced the service of his sentence, and served at least one day of it. Thereafter, by court order, his status was purportedly changed, still against his will. We think it fundamental that having commenced his sentence, he was entitled to complete it.

THE THEORY OF THE GOVERNMENT

So grotesque is the result below, that the government has been unable to concoct, at any stage, a consistent theory to support it. The government's various presentations have not been merely illogical; they have not even been compatible.

They have, however, been remarkably successful.

Thus, the prosecutor has obtained both the denial and the grant of the stay of execution; and he has been permitted to avail himself of the advantages, and to disavow the burdens, of both those orders.

In the trial court, three propositions were advanced as authority for modification of the sentence.

First, it was contended that Rule 35 of the Federal Rules of Criminal Procedure authorized any modification, provided only that sixty days had not elapsed (A. 9, 10). But that Rule permits only *reduction* of a sentence or correction of an illegal sentence. The sentence here was not

illegal, and authority to reduce a sentence cannot possibly be construed as authority to increase that sentence. *United States* v. *Walker,* 346 F.2d 428, 430, 4 Cir. 1965.

Second, it was held that since no formal sentence had been signed, the sentence was subjected to change. That argument is both factually and legally erroneous. A written sentence order had indeed been signed (A. 2). More, it is the oral sentence which controls; the written sentence must conform to the oral sentence. *Payne* v. *Madigan,* 274 F.2d 702, 704, 9 Cir. 1960, Aff'd 366 U.S. 761; *Rakes* v. *United States,* 309 F.2d 686, 687, 4 Cir. 1962. And in any event, the written order of March 29, 1966 corresponded exactly to the oral pronouncement of that date.

Finally, the trial court stated that its original pronouncement had been a mistake (A. 10). But the only mistake related to the legal effect of the court's action. The court's original order had been entered deliberately with full knowledge of all relevant facts. A mistake of law will not justify a subsequent modification of a partially served sentence. *Kennedy* v. *United States,* 9 Cir. 1964, 330 F.2d 26, 27-28; *Miller* v. *United States,* 147 F.2d 372, 374, 2 Cir. 1945; *Ekberg* v. *United States,* 167 F.2d 380, 388, 1 Cir. 1948; *Duggins* v. *United States,* 240 F.2d 479, 6 Cir. 1957; *Frankel* v. *United States,* 131 F.2d 756, 758, 6 Cir. 1942; *Tatum* v. *United States,* 310 F.2d 854, 855, D.C. Cir. 1962.

On review, the government shifted its grounds. It made no attempt to defend, under Rule 35, the victory which that Rule had gained for it in the trial court. Nor did it rely upon any of the other grounds relied on in the trial court.

In the Court of Appeals, the government relied on "inherent power" instead of a statutory delegation of power. It made two points:

First, it claimed that the sentence constituted "an ambiguity" (G.Br. P. 5).

Second, it stated that the sentence had been clearly expressed, and the subsequent orders merely gave effect to that clear expression (G.Br. P. 5, 6).

The concept of a clearly expressed ambiguity, did not commend itself to the Court of Appeals. That court, apparently misapprehending the contents of the record, held that the defendant had been confined, after his sentence, only for want of bail. At the same time, the opinion recites facts which make it very clear that such was not the case, and that the defendant had been a federal prisoner serving his sentence like any other prisoner for at least one day after that sentence was imposed.

In that posture, petitioner prays that he may be excused if he feels a very real uncertainty as to the theory behind his incarceration. Every time the theory against him is expressed, that expression is blown away in the wind of the next change.

And that is perhaps as it should be.

For there is no logical basis in law, for the handling that the petitioner has received. The issue can only be stated, with candor, in pragmatic and emotional terms.

The government wants the petitioner in jail, for as long as it can keep him there; and any rationale which accomplishes that purpose, will suffice.

The petitioner, for his part, simply thinks and urges that the whole thing is disgraceful.

The Intent of The Sentence

In ultimate terms, the rationale behind the handling of the Petitioner, is that the clearly expressed intent of the trial judge has in fact been implemented.

But has it?

The intention of the trial court so far as expressed, was that Petitioner be sentenced to a five-year term and commence his sentence at once. That much of the judgment order, is very clear.

It is equally clear, that the sentencing judge desired that Petitioner serve a state sentence in addition to his federal sentence. But it was simply not within the power of the District Court, to determine when, or where, or whether the petitioner would serve his state sentence.

If that portion of the trial judge's sentence be viewed as "a clear expression of intent", then it was his clear intent that the defendant serve his federal sentence and then be released to the state authorities.

The "intent" of the subsequent proceedings, was obvious: To prevent the State Court from ordering that its sentence be served concurrent with the Federal sentence.

At the time of sentencing, the prosecutor vigorously and successfully resisted any attempt to delay immediate service of sentence. The following day, having changed his mind, and having decided he wanted the precise opposite of what he had obtained the previous day, he was granted that as well.

It is very clear, that the prosecutor changed his mind, and decided to request a stay of execution after the defendant had been confined, because he realized such confinement might result in service of one sentence rather

than two. He realized that the State might well choose to run its sentence concurrent with the federal sentence. He did not want that to happen.

Accordingly, he returned for a private conversation with the judge. But for the presence of the court reporter, his conversation was quite private. Certainly, neither petitioner nor his attorney were advised of the development—the petitioner, because he was in the county jail; the attorney, because he might prove disruptive of the government's plan.

The prosecutor was quite candid in his private conversation with the court. He advised the judge that on reflection, he thought that the "sentence may well not be implemented"[3] unless the defendant were granted a stay. Obviously, he feared that the state would impose a sentence concurrent with the federal sentence. It was for that reason, that he suggested that "the proper course" would be to grant a stay. (A. 7).

The trial judge directed that the defense be notified of the government's motion. The caliber of the notice given, is apparent from the fact that when the prosecutor's motion was called the following morning, the prosecutor conceded the necessity to restate the nature of his motion "so that counsel is informed."

The Court of Appeals has conferred upon the prosecutor, a rich reward for his private conversation with the Court. For it is on that basis, that the Court of Appeals says that the government "in effect" moved for a stay of execution on the same day sentence was imposed.

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[3] Later, he stated that the order *"would* not be implemented if the defendant were incarcerated immediately on the Federal sentence." (A. 8, Emphasis Added).

But that is not the test. In determining whether jeopardy has attached for purposes of the Fifth Amendment, the question is not what relief the prosecution has asked for, but rather what has been done to the defendant. A sentence may be changed on a day of its imposition, but only if the prisoner has not yet been moved from the court building to the jail. *Trant* v. *United States,* 90 F.2d 718, 719, 7th Cir. 1937; *Oxman* v. *United States,* 148 F.2d 750, 753; *Rowley* v. *Welch,* 114 F.2d 499, 501-503. The Fifth Amendment can be stretched that far; but it cannot be stretched farther without breaking. *Ex parte Lange* (1874), 85 U.S. 163, 173, 21 L.Ed 872, 878.

On the authority of the opinion below, by simply entering and continuing the government's motion for stay at the time of sentencing, a prisoner can be placed in a custodial limbo for an indeterminant period of time.

THE STATE SENTENCE IN THE FEDERAL COURT

Another highly disturbing feature of this case, goes to the issue of the interrelationship of the state and the federal judicial systems.

Had the defendant been serving the state sentence at the time judgment had been passed on him, it obviously would have been proper for the district judge to remand the defendant to state custody and direct that his federal sentence commence on the expiration of his state sentence.

But that was not the case here. The federal court addressed itself to a state sentence which had never been commenced, and which was still susceptible of modification or lenity.

In fact, such lenity is obviously what the prosecutor feared.

In these circumstances, it would have been proper for the District Court to state that the defendant was to receive no credit against his federal sentence for any time he might serve against his state sentence. Had he done that, the district judge would have been limiting his judgment to the manner of service of the federal sentence.

But again, that is not what happened. The district judge went very much further. He undertook to prescribe that the state authorities should take the defendant first, and execute their judgment upon him, and then surrender him to the federal authorities.

In so doing, the District Court went far beyond its proper area of consideration. It simply was not within the power of that court to say when, or where, or even whether the state sentence should be served. The state sentence presented no situation involving federal supremacy. It presented no federal question at all. The District Court simply had no legitimate concern with that sentence.

We regard it as very ominous, that a United States District Court should undertake to prevent a state court from exercising leniency with respect to a state offense. There is, of course, a very broad area within which the federal judiciary properly undertakes to compel state action. But to wander casually outside that area, is to substitute omnipotence for the power of review.

Not infrequently, federal judges are called upon to pass sentence upon state prisoners. They must then determine whether the federal sentence is to be served concurrently with, or consecutively to the state sentence. But the only proper consideration in such a case, is the federal sentence. If, in such circumstances, the federal courts are to undertake to influence state sentences, or parole procedures, or other matters of pure state concern, then many discredited

and hyperbolic predictions of the total subservience of the state judiciary to its federal counterpart, will have been realized.

THE RIGHTS OF THE PETITIONER

Petitioner's sentence was increased after he had begun to serve it.

The very orders entered by the court, make it clear upon their face that the sentence was modified. (A. 2).

As a matter of substance, the sentence has been changed substantially whether the court's orders so recite or not. The order of service of consecutive sentences, is a matter of substance and cannot be changed once jeopardy has attached. *United States* v. *Daugherty*, 269 U.S. 360, 362-363; *Payne* v. *Madigan*, 274 F.2d 702, 704, 9 Cir. 1960; *Rakes* v. *United States*, 309 F.2d 686, 688, 4 Cir. 1962.

For twenty-four hours after Petitioner's federal sentence was imposed, he was in a posture in which he was required to serve a five-year federal sentence followed by a three-year state sentence.

The reversal of that order of service of sentence, would in itself suffice to constitute a violation of the Fifth Amendment prohibition against double jeopardy.

But there is more. Petitioner was ordered to go to jail and serve his sentence. He did so, for a while. Then, he was called back and told to go to a different jail, and serve a different sentence, and then come back and finish the one that was interrupted. The Fifth Amendment prohibits such handling. *White* v. *Pearlman*, 10 Cir. 1930, 42 F.2d 788, 789; *Albori* v. *United States*, 9 Cir. 1933, 67 F.2d 4, 7; *McDonald* v. *Lee*, 5 Cir. 1954, 27 F.2d 619, 623, vacated 349 U.S. 948, 99 L.Ed. 1274. It was felt, however, that the

Petitioner should be jailed for as long a time as possible, and that technicalities should not prevent the attainment of that objective.

In the name of expediency, much has been lost through the opinion below, and much more will be lost in the future. In the aspect of double jeopardy, there can be no partial preservation of the Fifth Amendment's protection. It will either exist, or it will not exist.

In this case, it has been ignored. A right which is ignored, is one which does not exist. It is all quite that simple.

The Rights of the Government

Over Petitioner's objection, the trial judge granted *to the government,* a stay of execution of Petitioner's sentence.

Nothing, anywhere, could be construed as authority for such action.

The Court of Appeals approved it as an exercise of the "inherent power" of the District Court. But such supposed inherent power is in direct conflict with the relevant statute and with the Fifth Amendment itself.

In clear words, the statute forbids imposition of a sentence to be preceded by a period of "detention". The statutory language is unequivocal. "No sentence shall prescribe any other method (than sentence credit commencing on confinement) of computing the term (of imprisonment)." Title 18 U.S. Code, Section 3568.

The caveat of the Fifth Amendment is equally plain:

> "The (Fifth) Amendment is a protection against jeopardy of second punishment, not merely against punishment for the second time . . . There can be no question that the sentence cannot be increased after

> service has commenced . . . Jeopardy exists when the court's action places the prisoner in irrevocable danger of execution of the sentence." (*Rowley* v. *Welch,* D.C. Cir. 1940, 114 F.2d 499, 502-503.)

There is no power, inherent or otherwise, to grant a stay of execution except on the defendant's application. Granted that a federal prisoner has few rights, the one right which has never been called into question is his right to serve his sentence. More commonly, such service is viewed as a duty to be enforced at gun point if necessary. If, for some reason, a court prefers that a defendant not commence his sentence, the obvious solution would be to defer the sentencing. But once sentence is passed, a defendant clearly has a right to undertake immediate satisfaction of the burden thereby imposed upon him. He cannot be forced, against his will, to stand idly by awaiting other events.

In the exercise of the "inherent power" created by the opinion below, it is realistic to imagine that a court may some day, moved by crowded penitentiary conditions, lighten the warden's burden by staggering the commencement of its sentences so that a defendant may wait for months, or even years, until there is room in the penitentiary to accommodate him. In the meantime, the District Court will have, in the words of the Court of Appeals, "ample authority to admit him to bail, conditioned upon his surrendering himself to commence such service of the federal sentence . . . " Such "admission to bail" can take, as it did here, the form of a 12½-fold bail increase, far beyond the defendant's resources; or it may perhaps, in the case of a wealthy few, be a meaningful admission to bail. Either way, whether a defendant sits at home in terror of the midnight knock on the door, or whether he sits in jail waiting for his punishment to commence, there will be no such thing as a maximum sentence, or even a

known sentence. The pseudo-prisoner will have only the cold comfort that he is merely being detained, and that the confinement—a different thing, somehow—is yet to come.

THE BASIC CONFLICT: IS THE CONSTITUTION A "WINDFALL"?

During the same week in which the court below rendered its opinion, the Court of Appeals for the Second Circuit published an opinion reaching an opposite conclusion. The facts presented in the Second Circuit were different from those of the case at bar, but the determining principle was identical. In the Second Circuit, as in the case at bar (G.Br. 6, 7) the government protested a prisoner's request for a "windfall". The Second Circuit however held: "The possibility of abuse inherent in broad judicial power to increase sentences outweighs the possibility of windfalls to a few prisoners". *United States* v. *Sacco,* 367 F.2d 368, 370.

The abuses envisioned by the Second Circuit are clearly foreshadowed by the opinion here appended.

On the authority of the opinion below, a sentence can be extended almost without restriction, by the simple expedient of granting to a sentenced prisoner an unwanted and disavowed stay of execution, while setting bail beyond the limit of his resources.

To a prisoner, confinement is punishment. To call it "mere detention", does not mitigate the loss of liberty which he suffers.

Euphemisms can not substitute for Constitutional rights.

CONCLUSION.

We pray that your Honors will consider this case worthy of review.

Respectfully submitted,

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